No. 89-449 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE FINANCIAL SERVICES COUNCIL, THE CONSUMER BANKERS ASSOCIATION, THE ASSOCIATION OF BANK HOLDING COMPANIES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND INSURANCE/FINANCIAL AFFILIATES OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The Financial Services Council, the Consumer Bankers Association, the Association of Bank Holding Companies, the American Financial Services Association, and Insurance/Financial Affiliates of America, Inc. respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition. Counsel for petitioners and counsel for respondent Constance Foster, Insurance Commissioner of the Commonwealth of Pennsylvania, have given their consent to the filing of this brief. The consent

of counsel for the Pennsylvania Association of Independent Insurance Agents, which intervened below and is a respondent in this Court, was requested but refused.

The Financial Services Council is a non-profit organization whose membership includes companies from all major segments of the financial services industry, including bank holding companies, savings and loan holding companies, insurance companies, and securities firms, as well as diversified firms engaging in both financial and non-financial activities. This varied membership is bound together by a common commitment to a fairer, more competitive, and more efficient financial services marketplace, one that enhances the ability of all firms to offer consumers low cost and innovative financial products and services in a manner that guarantees the safety and soundness of depository institutions and protects against conflicts of interest, coercive tying, and other improper practices. The Financial Services Council has provided testimony before Congress and has initiated across the country educational programs addressing concerns with respect to the provision of financial services.

The membership of the Financial Services Council includes the Acacia Group, AmBase Corporation, American Express Company, Bankers Trust New York Corporation, Beneficial Corporation, CalFed Inc., Capital Holding Corporation, Chemical Bank, Citicorp, Commercial Credit Company, Dean Witter Financial Services Group, Inc., First Interstate Bancorp, Fleet/Norstar Financial Group, Inc., Ford Financial Services Group, G.E. Financial Services, Household International, John Hancock Mutual Life Insurance Company, J.P. Morgan & Co., Inc., Kemper Financial Services, Inc., KeyCorp, Meridian Bancorp, Inc., Merrill Lynch & Co., Inc., Security Pacific Corporation, and United Services Automobile Association.

The Consumer Bankers Association (CBA) was founded in 1919 to provide a progressive voice for the retail bank-

ing industry. CBA's membership consists of approximately 800 federally insured banks and thrift institutions which hold more than 80 percent of all consumer deposits nationwide and more than 70 percent of all consumer credit held by federally insured depository institutions.

The Association of Bank Holding Companies is a national association of regional and money center bank holding companies that are registered with and regulated by the Board of Governors of the Federal Reserve System pursuant to the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* The Association's membership represents over 70 percent of the commercial banking deposits in the United States and participates in a wide range of insurance activities permissible under federal and state law.

The American Financial Services Association (ASFA) is the nation's largest trade association representing nonbank providers of consumer financial services. Organized in 1916, AFSA represents 572 companies engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance companies to the nation's largest financial services, retail, and automobile companies. ASFA's members hold over $143 billion of consumer credit outstanding and over $38 billion in second mortgage credit, representing approximately one quarter of all consumer credit outstanding in the United States.

Insurance/Financial Affiliates of America, Inc. is an organization of financial institutions with an interest in both banking and insurance activities. Members include insurance companies as well as banks and bank holding companies which own subsidiaries engaged in some fashion in the insurance business.

The present case is of particular interest to *Amici* because the Pennsylvania statute upheld by the Third Cir-

cuit interferes directly with the ability of commercial entities to provide needed financial services to consumers across the Nation. No other State has arrogated to itself the power to regulate the *national* financial services market in the manner Pennsylvania has, and that attempt seriously threatens the development of the competitive and efficient financial services market to which *Amici* are committed. Moreover, *Amici*, because of their diverse membership, are uniquely positioned to apprise the Court of the nationwide impact of the Pennsylvania statute.

Accordingly, *Amici* submit that their participation may help ensure that the Court is presented with a full exposition not only of the issues raised in this case but also of the deleterious effect that denial of the writ would have on the orderly, efficient and cost-effective provision of financial services throughout the United States.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Financial Services Council is a non-profit organization whose membership includes companies from all major segments of the financial services industry, including bank holding companies, savings and loan holding companies, insurance companies, and securities firms, as well as diversified firms engaging in both financial and non-financial activities. This varied membership is bound

together by a common commitment to a fairer, more competitive, and more efficient financial services marketplace, one that enhances the ability of all firms to offer consumers low cost and innovative financial products and services in a manner that guarantees the safety and soundness of depository institutions and protects against conflicts of interest, coercive tying, and other improper practices. The Council has provided testimony before Congress and initiated across the country educational programs addressing concerns with respect to the provision of financial services.

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tem pursuant to the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* The Association's membership represents over 70 percent of the commercial banking deposits in the United States and participates in a wide range of insurance activities permissible under federal and state law.

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Insurance/Financial Affiliates of America, Inc. is an organization of financial institutions with an interest in both banking and insurance activities. Members include insurance companies as well as banks and bank holding companies which own subsidiaries engaged in some fashion in the insurance business.

The present case is of particular interest to *Amici* because the Pennsylvania statute upheld by the Third Circuit, Section 641 of the Pennsylvania Insurance Department Act, 40 Pa. Stat. Ann. § 281, interferes directly with the ability of commercial entities to provide needed financial services to consumers across the Nation. No other State has arrogated to itself the power to regulate the *national* financial services market in the manner Pennsylvania has, and that attempt seriously threatens the development of the competitive and efficient financial services market to which *Amici* are committed.

ARGUMENT

The Petition for Certiorari in this case explains the Third Circuit's error in insulating the Pennsylvania statute from Commerce Clause scrutiny solely because it does not—on its face—discriminate against interstate relative to intrastate commerce. *See* Pet. at 9-15. The approach of the court below—automatically upholding any statute that applies equally to interstate and intrastate commerce—nullifies this Court's previously well-established balancing test for assessing the burdens on interstate commerce in light of the local interests sought to be served by such facially neutral regulation.

This Court's decisions make clear that the balancing test applies precisely when the challenged law on its face "regulates evenhandedly to effectuate a legitimate local interest." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In such a case a court is not to uphold the law without further inquiry, as the court below did, but instead is to consider whether the burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* In answering that question, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id. See Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. 1262, 1280, 1282 (1989).

The court below did not engage in this analysis. Had it done so, it could not have properly avoided concluding that the effects of Section 641 on interstate commerce far outweigh the local interests allegedly promoted by the regulation. Indeed, scrutiny of the extent to which those local interests could be promoted without the dramatic impact on interstate activities leads to the conclusion that those interests are pretextual and that the real purpose of the state law mirrors its actual effect: to keep diversified, primarily out-of-state financial services

firms with insurer affiliates from competing with local independent insurance agents in providing services to Pennsylvania residents. Thus, Section 641 is per se invalid as " 'simple economic protectionism' " whose " 'effect is to favor in-state economic interests over out-of-state interests,' " [1] quite apart from the results of balancing the burdens on interstate commerce against the putative local benefits.

In Part I below we set forth the dramatic effects that enforcement of Section 641 would have on the national financial services market, not only in Pennsylvania but far beyond that State's borders. Part II considers the local interests allegedly promoted by the statute, and whether they could be achieved as well without imposing such severe burdens on interstate commerce. Finally, Part III reviews the manner in which Section 641, in practical operation, discriminates against interstate commerce, penalizing out-of-state companies and consumers to protect Pennsylvania independent insurance agents from legitimate competition.

I. Enforcement Of Section 641 Would Have A Dramatic Impact On The *National* Market For Financial Services

At the outset, it is important to recognize that the financial services market has undergone far-reaching changes during the years since the passage of Section 641 in 1974. A large number of diversified financial services firms have emerged and now offer a broad range of insurance, banking, investment, and other services to consumers across the Nation. A 1984 Task Force chaired by then-Vice President Bush noted that "insurance companies * * * have, like investment banking firms, also acquired limited purpose banks, together with securities

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[1] *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. at 1280, 1282 (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978), and *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

brokerage and underwriting firms and other providers of financial services," and concluded that "depositories will increasingly enter activities traditionally limited to investment banking, brokerage and insurance firms, and vice-versa." [2]

As one witness recently testified before Congress:

> [O]ld fashioned compartmentalization of financial services * * * has, in fact, already broken down. Banks now own discount brokerages. They underwrite municipal bonds to a limited degree, and offer money market accounts. Securities firms offer deposit accounts that are readily accessible by checks and debit cards. Many insurance companies no longer advertise as such, but refer to themselves as financial services companies, offering a full range of products to their retail customers. [Testimony of James D. Robinson III, Chairman of American Express, before the Subcommittee on Financial Institutions of the House Committee on Banking, Finance, and Urban Affairs, 100th Cong., 2d Sess., Serial No. 100-40, pt. IV, at 145 (1988).]

With respect to the insurance industry particularly, a 1985 survey conducted by the American Council of Life Insurance found 40 responding life insurance companies that owned or were affiliated with banks and 49 that owned or were affiliated with thrifts.[3] The extent of the insurance industry's affiliations with banks and thrifts is demonstrated by the following statistics: seven of the top 30 life insurers are affiliated with a bank or thrift

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[2] Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services 25-26 (1984), *reprinted in Bush Task Group Report on Regulation of Financial Services: Blueprint for Reform (pt. 1), Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess., at 297 *et seq.* (1985).

[3] *Life Insurance Companies in the Financial Services Market* (American Council of Life Insurance Survey, March-April 1985), at 3.

and represent fully 41 percent of the assets of the top 30;[4] in the property and casualty insurance field, some 22 percent of net premiums written by the top 30 companies in 1988 were written by companies affiliated with a bank or thrift;[5] nationwide, more than 16 percent of new life policies issued during the first six months of 1989 were issued by companies that were affiliated with a bank or thrift;[6] and in Pennsylvania, insurance companies affiliated with banks or thrifts account for at least 17.5 percent of the private automobile insurance market, 14.5 percent of the homeowners insurance market, and 24 percent of life insurance premiums in Pennsylvania.[7]

The foregoing demonstrates that the homogenization among providers of financial services, the trend toward product and demographic diversification by banking, securities, and insurance firms, and the emergence of "supermarkets" within the financial services industry are by now well established.

Pennsylvania's statute stands athwart this national development. The Pennsylvania statute puts a company like petitioner USAA—issuing insurance in Pennsylvania and owning a federal savings bank in Texas—to the choice of doing one or the other but not both, even if the Texas bank has no contact whatever with Pennsylvania residents. Section 641 thus has a direct effect on the market for financial services far beyond Pennsylvania's borders.[8]

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[4] *See* Fortune 376-377 (June 5, 1989).

[5] *See Best's Insurance Reports: Property-Casualty* (1989), at 53B-56B.

[6] Statistics provided by Life Insurance Marketing and Research Association, Inc. of Hartford, Connecticut.

[7] Statistics derived from market share data contained in *A.M. Best Executive Data Service.*

[8] *Cf. Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (striking down Iowa law banning certain double tractor-

Pennsylvania's restriction effectively regulates the organization and conduct of national firms and their manner of doing business outside Pennsylvania. Section 641 dictates that a company wishing to offer insurance in Pennsylvania—the fourth largest market in the country, *see* Pet. at 16—not affiliate with a financial institution anywhere else in the country. This restriction significantly affects the business and financial condition of the insurer and, if the insurer should choose to withdraw its Pennsylvania license, markedly reduces competition and consumer choice in Pennsylvania with respect to insurance products and services. If, on the other hand, the insurer should elect to divest its financial affiliate or affiliates, such divestiture would mean, in addition to substantial economic loss to the insurer, markedly less competition in the financial services market and fewer lending resources in communities in the other 49 States. At a time of significant change in the financial services business, restricting the ability of major entities such as the large insurers to compete can distort the structure of the developing market for years to come.

II. The Local Interests Allegedly Promoted By Section 641 Are Illusory Or Can Be Achieved Without Burdening Interstate Commerce

Weighed against these dramatic effects on the nationwide market for financial services are the local interests advanced by Section 641. The statute was purportedly enacted to protect the insurance industry from unfair concentration, to protect consumers from "coercive tie-ins" by lenders, and to protect the ability of insurance examiners to monitor the insurance industry. *See* Pet. App. 59a. The mere "incantation of a purpose to promote" the public good, however, "does not insulate a state law from Commerce Clause attack." *Kassel* v. *Consoli-*

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trailers when all other midwestern and western States permitted them).

dated Freightways Corp., 450 U.S. at 670 (opinion for plurality by Powell, J.). Under this Court's decisions, whether such local interests outweigh the burdens on interstate commerce turns in part on whether the local interests "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142.

As noted, the court below—because of its erroneous legal theory—did not scrutinize the purported purposes underlying Section 641, or consider whether they could be achieved with less disruption of interstate commerce. The District Court, however, *did* consider these purposes, in accord with this Court's precedents, and concluded that the alleged concerns underlying the statute were "either not present * * * or [were] readily prevented in ways less burdensome than is prescribed in Section 641(b)." Pet. App. 59a.

With respect to the concern about economic concentration, the District Court cited the testimony of the Pennsylvania Deputy Insurance Commissioner to the effect that such concentration was not a concern on the facts of this case, where the insurer was affiliated with a small out-of-state savings bank. Pet. App. 60a. In fact, the typical insurance company affiliation triggering Section 641 is not with a major bank, but rather—as in this case—with a small thrift institution, presenting no danger of financial concentration.[9]

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[9] Pennsylvania's putative concern about economic concentration in the financial services industry is also unwarranted because this issue has been comprehensively addressed by Congress. A variety of federal statutes, including Section 4 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843, and Section 10(c) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. § 1730a, regulate permissible affiliations between lending institutions and insurance companies. Moreover, both the language and legislative history of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982), and the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552

With respect to the purported concern about monitoring insurance companies, the District Court concluded that "even in the absence of Section 641(b) the insurance examiners would still be able to examine the solvency of affiliated companies." Pet. App. 60a. Indeed, the trial court noted that federal law mandated that the results of federal bank examinations be made available to state officials to assist them in their duties. *Id.*

Finally, the District Court ruled that there was no danger of coercive tie-ins on the present facts, because USAA's Texas bank had no operations in Pennsylvania. Pet. App. 60a-61a. As noted, the statute's prohibition applies regardless of the location of the affiliated financial institution, but there cannot be a potential tie-in problem with respect to a financial institution located outside the State and doing no business in the State. The fact that Section 641 regulates forms of business organization that do not affect a single Pennsylvania consumer strongly suggests that it was not motivated by a desire to safeguard such consumers but rather to protect in-state insurance business interests from competition.

In addition, Pennsylvania's putative concerns with the danger of "coercive tie-ins" are illusory. Federal law *already prohibits* the kinds of tie-ins at which Section 641 is ostensibly directed.[10] *See* Section 106 of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1971-1972 (banks and bank holding companies), and Sections 5(q) and 10(n) of the Home Owners' Loan Act of 1933, as newly reenacted by Section 301 of the Fi-

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(1987), demonstrate unequivocally that Congress has given *careful* and *detailed* consideration to the issue whether—and to what extent—various categories of financial institutions and their affiliates should be permitted to engage in the insurance business.

[10] Both consumers and competitors have an express cause of action to enforce these anti-tying provisions and an incentive to do so, as a prevailing plaintiff will recover treble damages as well as reasonable attorney's fees. *See* 12 U.S.C. §§ 1464(q)(3), 1975.

nancial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA") (savings associations and savings and loan holding companies).[11]

Furthermore, it is clear that there are available alternative means of addressing the tie-in problem that do not entail the severe burdens on interstate commerce imposed by Section 641. Indeed, Pennsylvania insurance law itself provides ample evidence of such an alternative approach. The tie-in problem allegedly underlying Section 641 is most palpably presented with respect to credit insurance. Yet Section 641 explicitly *exempts* "credit life, health and accident insurance" from its scope, permitting insurers affiliated with financial institutions to offer such credit insurance in Pennsylvania. *See* Pet. at 2. The tie-in problem is dealt with more directly in Pennsylvania Insurance Code § 40-63-101 *et seq.* and its implementing regulations, which forbid tie-in sales of credit insurance.

The State has offered no explanation as to why the tie-in problem can be addressed by direct regulation when it is most acute—in the credit insurance area—but not when its danger is more attenuated. The explanation for the exemption of credit insurance in Section 641 seems to be that such insurance is generally not sold by independent insurance agents. Thus, the exemption lays bare the fact that the real purpose of the statute was to protect the markets of those agents, rather than prevent coercive tie-ins. If the latter were the real purpose, it could be achieved much more readily and without excessive burdens on interstate commerce through a direct ban

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[11] The anti-tying provisions applicable to savings associations and savings and loan holding companies are not new with FIRREA but are merely recodifications of pre-existing law. *See* 12 U.S.C. §§ 1464(q), 1730a(n).

—as in the case of Pennsylvania's own regulation of credit insurance tie-ins.[12]

It is important to recognize that the Third Circuit in no way disagreed with the District Court's conclusion that the concerns underlying the challenged statute were either not implicated or could readily be served without the serious burdens on interstate commerce caused by Section 641.[13] Rather, the Court of Appeals simply concluded that there was *no* burden on interstate commerce and therefore no need to scrutinize the validity of the local interests allegedly promoted by the state law.

III. Section 641 Violates The Commerce Clause Because It Discriminates Against Interstate Commerce In Both Purpose And Effect

The transparency of the concerns alleged to underlie Section 641 cannot conceal the true purpose of the statute—to shield independent insurance agents in Pennsylvania against competition from diversified financial services organizations—organizations whose structure and resources allow them in many cases to offer consumers greater convenience, lower costs, and better services. Even the court below acknowledged that the statute "may provide somewhat of a boon to independent insurance agents who sell insurance in Pennsylvania * * *." Pet.

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[12] A variety of alternatives exist which would achieve Pennsylvania's stated objective without discriminating against interstate commerce. For example, in 1985, the National Association of Insurance Commissioners adopted a Model Unfair Trade Practice Act. Section 5(a) of that Act specifies that "[n]o person may require as a condition to the lending of money or extension of credit * * * that the person to whom such money or credit is extended * * * negotiate any contract of insurance or renewal thereof through a particular insurer or group of insurers * * *."

[13] *Cf. Maine* v. *Taylor*, 477 U.S. 131, 144-147 (1986) (deference to District Court findings on issue whether alternative means exist to achieve local purpose without discriminating against interstate commerce).

App. 38a. Those agents know well enough the purpose and effect of Section 641; they intervened in the District Court to defend the statute and protect their insulation from competition. *See* Pet. at 4.

The *Pike* v. *Bruce Church* balancing test is applicable to state regulation that does not discriminate between interstate and intrastate commerce. As explained above, Section 641 fails that test. It is, however, not even clear that the Pennsylvania statute qualifies for balancing. In practical operation, the statute discriminates against interstate commerce, and thus contravenes the Commerce Clause quite apart from any balancing of interstate burdens and purported local benefits.

The protections of the Commerce Clause are not limited to discrimination that appears on the face of a statute. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-354 (1977). "The Commerce Clause forbids discrimination, whether forthright or ingenious," and prohibits state "legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455, 457 (1940). As this Court has often stated, "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citations omitted); *see also Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).

The court below erroneously concluded, apparently based on the facial neutrality of Section 641, that its enforcement would not have the effect of favoring in-state over out-of-state interests. Instead, the Court of Appeals' principal focus should have been on "the *practical* operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980)

(emphasis supplied). *See, e.g., American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) (holding state tax unconstitutionally discriminatory despite absence of facial discrimination).

As explained above, the practical effect of Section 641 is to shield independent insurance agents in Pennsylvania against competition from diversified financial services organizations. The court below concluded that this protectionism did not raise Commerce Clause concerns because it applied against lending institutions in Pennsylvania as well as those outside the State:

> To the extent that the regulation infringes upon the commercial association rights of lending institutions outside of Pennsylvania, it infringes upon those same rights of lending institutions within Pennsylvania. In that light, even if § 641 is viewed as "protectionist" of the economic interests of unaffiliated insurers, because it does not afford that protection only to local agents, it is not violative of the Commerce Clause. [Pet. App. 38a (footnote omitted).]

This analysis is flawed in two significant respects. First, to the extent the court below seeks to justify the statute as beneficial to independent insurance agents located outside of Pennsylvania in the same way it is a boon to the homegrown variety, it advances a state interest which has no constitutional legitimacy. In *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), this Court accepted Illinois' interest in protecting its own citizens from the deleterious effects of takeover battles, but, in denouncing the "sweeping extraterritorial effect" of the Illinois antitakeover statute, held that a "state has no legitimate interest in protecting nonresident shareholders." [14]

Second, the Third Circuit's analysis ignores the "practical operation" of Section 641. *Lewis* v. *BT Inv. Man-*

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[14] *Id.* at 644. *See also Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945) (invalidating state law where the "practical effect * * * is to control [conduct] beyond the boundaries of the state").

agers, Inc., 447 U.S. at 37. The vast majority of the diversified financial services organizations affected by Section 641 are not Pennsylvania corporations. Of the 50 largest life insurers, only one is domiciled in Pennsylvania, and—so far as *amici* can determine—it is not presently affected by Section 641.[15] While only an insignificant percentage of the affected entities are Pennsylvania companies, Pennsylvania is a critical insurance market for all national companies. In short, Pennsylvania is a vital market serviced largely by out-of-state companies. Through Section 641, the State has used the leverage of access to its market to force the out-of-state companies not to compete with in-state independent insurance agents through diversification and the offering of a broad range of financial services. As this Court noted recently, however, "shielding in-state industries from out-of-state competition is almost never a legitimate local purpose * * *." *Maine* v. *Taylor*, 477 U.S. at 148.

Pennsylvania has effectively exploited its considerable market power as the fourth largest insurance market in the United States to gain advantages for its resident independent insurance agents at the expense of the rest of the country. The advantages it secures for its independent insurance agents are, for example, at the expense of citizens in Texas, who have fewer lending resources available because USAA cannot accept deposits and lend in Texas and also sell insurance in Pennsylvania. With Section 641, Pennsylvania has impermissibly burdened interstate commerce and interfered with policy choices of other States and the Federal Government. Curbing this kind of behavior is precisely what the Framers of the Commerce Clause intended. *See, e.g.*, The Federalist No. 6 (A. Hamilton) (J. Cooke ed. 1961); 1 The Records of

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[15] *See* Fortune 376-377 (June 5, 1989). The Pennsylvania company is Penn Mutual Life, ranked thirty-ninth.

the Federal Convention of 1787 at 19, 164 (M. Farrand ed. 1911).

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In a recent decision, this Court noted that both the *per se* test and the balancing test were directed at answering the same underlying question:

> [T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruch Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. [*Brown-Forman Distillers Corp.*, 476 U.S. at 579.]

Here the burdens on interstate commerce are severe and the putative local benefits illusory or readily achievable through alternative means that do not burden interstate commerce, and the actual effect of the statute is to protect Pennsylvania independent insurance agents from out-of-state competition. Whether analyzed under the *per se* test or the balancing test, Section 641 violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the Petition and reverse the decision below.

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